UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Constellation Energy Commodities Group, Inc. Docket No. EL07-42-000

ORDER DENYING DECLARATORY ORDER

(Issued June 21, 2007)

1. On March 1, 2007, Constellation Energy Commodities Group, Inc. (Constellation) filed a petition for a declaratory order requesting that the Commission declare that Section VIII (A) of the Forward Capacity Market (FCM) Settlement Agreement has no effect on Constellation's rights to renegotiate the prices in its four wholesale power purchase agreements with The Narragansett Electric Company (Narragansett).[1] As discussed below, we deny Constellation's petition.

Background

2. Constellation is a wholesale power supplier. Narragansett is a retail electric distribution company that delivers electricity to approximately 478,000 retail customers in Rhode Island.[2] Constellation supplies Narragansett with wholesale energy and capacity at fixed prices[3] under four separate power purchase agreements[4] negotiated under Constellation's market-based rate authority.[5]

---

[1] The Commission approved the FCM Settlement Agreement in *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (*Devon Power*).

[2] Narragansett Electric Company's Motion to Intervene and Protest at 3 (Narragansett's Protest).

[3] The power purchase agreements state that Constellation will supply Narragansett capacity at a stipulated base price plus a fuel adjustment factor covering the entire quantity that Constellation delivers under the purchase power agreements. *See* Petition for Declaratory Order of Constellation Energy Commodities Group, Inc. at 15 (Constellation's Petition).

3. Constellation claims that each power purchase agreement contains an "equitable adjustment clause" entitling it to renegotiate the price whenever any regulatory change materially alters the economic benefits and burdens contemplated by the parties at the time they executed the agreement.[6] Constellation states that these equitable adjustment clauses were intended to ensure that neither party is "forced to bear solely the risk of material regulatory changes."[7] Narragansett responds that these clauses appear in only three power purchase agreements,[8] and contests Constellation's description of their legal consequences. In Narragansett's view, Constellation must supply Narragansett with the

---

[4] Constellation identifies the four power purchase agreements, executed between 1998 and 2002, as follows:

(1) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (the 20 percent contract). This agreement is dated December 21, 1998, and was amended on January 27, 2003 and June 3, 2003. It is in effect until midnight on December 31, 2009.

(2) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (the 36 percent contract). This agreement is dated December 21, 1998, and was amended on January 27, 2003 and June 3, 2003. It is in effect until midnight on December 31, 2009.

(3) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (the 2001 contract). This agreement is dated October 5, 2001 and is in effect until December 31, 2009.

(4) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (the 2002 contract). This agreement is dated August 23, 2002 and is in effect until midnight on December 31, 2009.

[5] Constellation's Petition at 15.

[6] *Id.* at 7.

[7] *Id.*

[8] Narragansett's Protest at 5.

capacity required to serve Narragansett's retail load "at the fixed prices specified in the PPAs [power purchase agreements], regardless of the prices Constellation must pay to secure that capacity."[9]

4. Constellation alleges that its costs for securing capacity have increased as a result of the FCM Settlement Agreement.[10] The FCM Settlement Agreement establishes a capacity auction in New England beginning on June 1, 2010. In the interim, the FCM Settlement Agreement establishes a transition period during which capacity will be sold according to fixed prices. Constellation states that these fixed transition prices are "dramatically higher" than the prices that existed when Constellation and Narragansett agreed to the fixed prices in the power purchase agreements.[11] Constellation argues, therefore, that the FCM Settlement Agreement constitutes significant regulatory change triggering its renegotiation rights.

5. On August 1, 2006, Constellation attempted to invoke its alleged renegotiation rights. Narragansett terminated negotiations after one meeting. Narragansett thereafter filed an action in the United States District Court for the District of Rhode Island (District Court) seeking, inter alia, a declaratory judgment that Section VIII (A) of the FCM Settlement Agreement precludes Constellation from renegotiating the power purchase agreements.[12] Section VIII (A) deals with arrangements for unforced capacity (UCAP), which is the amount of installed capacity (ICAP) available for purchase after calculating a generating unit's forced outage rate. UCAP is the capacity required by a load serving entity (LSE), such as Narragansett, to serve its load. Section VIII (A) states that:

> The current UCAP products shall be retained for the period commencing on December 1, 2006 and ending on May 30, 2010 (the "Transition Period") as provided for in Part VIII. Payments will be made to UCAP entitlement holders, and made by UCAP obligation holders including wholesale standard offer suppliers in Rhode Island as under the current Market Rules and tariffs; it being understood that the agreement of wholesale standard

---

[9] *Id.* at 8.

[10] Constellation neither signed nor protested the FCM Settlement Agreement.

[11] Constellation's Petition at 3. All of the power purchase agreements terminate before the June 1, 2010 start of the capacity auction.

[12] Narragansett's Protest at 8.

> offer suppliers in Rhode Island to make UCAP payments is contingent upon the agreement of the state of Rhode Island utility regulatory authorities to support the settlement.[13]

On January 9, 2007, the Rhode Island Attorney General, on behalf of several Rhode Island agencies, filed a motion to intervene and join Narragansett's claim.

Petition for Declaratory Order

6. In the instant petition, Constellation is not asking the Commission to determine whether Constellation has renegotiation rights under the power purchase agreements, or to confirm Constellation's view that its renegotiation rights are triggered by the FCM Settlement Agreement. Rather, Constellation is asking the Commission to declare that Section VIII (A) does not preclude Constellation from exercising whatever renegotiation rights the District Court determines that Constellation has under the power purchase agreements.

7. As a threshold issue, Constellation argues that the Commission has exclusive jurisdiction over this case.[14] Constellation maintains that the Federal Power Act[15] grants the Commission exclusive jurisdiction to determine the rates for the sale of wholesale power,[16] and that the filed rate doctrine bars courts from entering any judgment that materially alters a contract provision affecting a rate filed with the Commission.[17] Constellation characterizes Narragansett's action before the District Court as an action for contract reformation, stating that Narragansett is seeking a declaration that the FCM Settlement Agreement has abrogated Constellation's right to negotiate equitable price adjustments in response to significant regulatory action.[18] Constellation claims that Narragansett is asking the court to exceed its authority by materially altering a contract provision directly affecting the rate on file with the Commission.

---

[13] *See* Constellation's Petition at 3-4.

[14] *Id*. at 13-16.

[15] 16 U.S.C. § 824-824(m) (2000).

[16] Constellation's Petition at 13-14.

[17] *Id*. at 14-16.

[18] *Id*. at 15.

8. In the alternative, Constellation argues that if the Commission determines that it shares concurrent jurisdiction with the District Court, the Commission should assert primary jurisdiction under *Arkansas Louisiana Gas Co. v. Hall*.[19] In that case, the Commission established three factors to consider when deciding whether or not to assert primary jurisdiction. These factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[20]

9. Constellation argues that each of the *Arkla* factors supports the Commission asserting primary jurisdiction here. First, Constellation states that the Commission has special expertise concerning matters related to capacity markets and to settlement agreements managed, administered, and approved by the Commission.[21] Next, Constellation claims that uniformity of interpretation "is crucial" in this case, because this case raises the issue of whether a Commission-approved settlement agreement can implicitly and indirectly modify a non-signatory's bilateral contract rights.[22] Finally, Constellation argues that its petition presents several issues that are important to the Commission's regulatory responsibilities, including whether settlement agreements can modify bilateral contracts without the agreements explicitly identifying the contracts, and without the Commission making particularized findings regarding the contracts, and whether courts or the Commission should clarify and interpret Commission-approved settlement agreements.[23] Constellation speculates that permitting courts to clarify and interpret settlement agreements could "significantly compromise" the settlement privilege under Section 602 of the Commission's regulations because courts may allow discovery regarding how the settlement was reached and what it intended to accomplish.[24]

---

[19] *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979) (*Arkla*), *reh'g denied*, 8 FERC ¶ 61,031 (1979).

[20] *Arkla*, 7 FERC ¶ 61,175, at 61,322.

[21] Constellation's Petition at 17.

[22] *Id*. at 18.

[23] *Id*.

[24] 18 C.F.R. § 385.602 (2006).

Constellation also expresses concern that judicial interpretation of Commission-approved settlement agreements will undermine faith in the utility and efficacy of the Commission's settlement process.[25]

10. As to the merits of its petition, Constellation states that Section VIII (A) of the FCM Settlement Agreement "does not purport to amend Constellation's bilateral contract rights."[26] In Constellation's view:

> [T]he natural and reasonable construction of Section VIII (A) provides that, the obligation of load-serving entities to pay UCAP entitlement holders may be satisfied (where applicable) by allowing the LSE to contract with a wholesale standard offer supplier to procure the requisite capacity, as the then-current rules allowed. . . . [It] further identifies the parties from whom generators providing capacity may look for payment. . . . [It] does not address, in any way, bilateral contractual provisions allowing Constellation or Narragansett to return to the economic balance struck between the parties at the time of contract formation.[27]

Constellation further states that since it did not sign the FCM Settlement Agreement, the provision making wholesale standard offer suppliers' consent contingent on Rhode Island utility regulatory authorities agreeing to the Settlement does not apply to Constellation.[28] Constellation also notes that Section VIII (A) contains no language amending or waiving particular bilateral contract rights, that Constellation did not receive consideration in exchange for waiving or abrogating its rights, that no party to the FCM Settlement Agreement raised the issue of its impact on equitable adjustment rights, and that the Commission did not specifically find that abrogating Constellation's contractual rights is in the public interest.[29] Finally, Constellation maintains that its failure to protest the FCM Settlement Agreement may not be regarded as evidence that it waived or acquiesced to any change in its rights under the power purchase agreements.[30]

---

[25] Constellation's Petition at 18.

[26] *Id*. at 19.

[27] *Id*.

[28] *Id*. at 20.

[29] *Id*. at 20-21.

[30] *Id*. at 22-23.

Notice of Filing and Responsive Pleadings

11. Notice of Constellation's filing was published in the *Federal Register*, with interventions and comments due on April 2, 2007.[31] TransCanada Power Marketing Ltd. (TransCanada) filed a timely motion to intervene. Narragansett filed a timely motion to intervene and comments opposing Constellation's petition. The Attorney General of Rhode Island, on behalf of the State of Rhode Island and Providence Plantations Carriers and the Rhode Island Division of Public Utilities and Carriers (collectively, Rhode Island) filed a timely motion to intervene and comments opposing Constellation's petition. Constellation filed an answer to the protests. Narragansett and Rhode Island filed answers to Constellation's answer.

Narragansett's Protest

12. Narragansett characterizes its action in the District Court as an action to enforce the power purchase agreements and the FCM Settlement Agreement.[32] Narragansett argues that the filed rate doctrine has no applicability in the instant case because Narragansett is not challenging the justness or reasonableness of any provision in the power purchase agreements, not even the provision that Narragansett describes as "the limited renegotiation provision" it states is present in three of the four power purchase agreements.[33] Narragansett asserts that under these circumstances the Commission does not have exclusive jurisdiction under the filed rate doctrine.[34] In any event, Narragansett argues that it is for the District Court, not the Commission, to determine whether the filed rate doctrine precludes the District Court from exercising jurisdiction over this case.[35]

13. Narragansett next argues that the Commission should refrain from exercising primary jurisdiction in this case.[36] Narragansett states that the District Court is fully capable of resolving the contract interpretation and enforcement issues in Narragansett's

---

[31] *Federal Register*, 72 Fed. Reg. 11,856-11,857 (2007).

[32] Narragansett's Protest at 10.

[33] *Id*. Constellation contends that the provision is present in all four agreements.

[34] *Id*. at 13.

[35] *Id*. at 14.

[36] *Id*. at 15.

complaint, and notes that the District Court has not requested the Commission's assistance in resolving this case.[37] Narragansett further claims that the *Arkla* factors counsel against the Commission asserting primary jurisdiction.

14. Narragansett first argues that the Commission's special expertise is not needed to resolve this dispute. Narragansett states that the Commission and the courts have repeatedly held that "interpretation of wholesale power contracts is an appropriate and proper function of the courts,"[38] and that here, Constellation has failed to offer any reason why the Commission's special expertise is needed to interpret the power purchase agreements. Similarly, Narragansett maintains that the Commission's special expertise is not required to address Narragansett's claim that Constellation has waived its renegotiation rights or to interpret Section VIII (A).[39] Narragansett further claims that this case presents no occasion for the Commission to utilize its special expertise in interpreting its own orders because the Commission did not discuss Section VIII (A) in *Devon Power*.[40] Narragansett points out that neither Constellation nor any other party filed comments objecting to Section VIII (A). Narragansett maintains that Section VIII (A) is "clear and unambiguous"[41] and that "Constellation's failure to avail itself of its rights when the Settlement Agreement was before the Commission does not render the clear terms of Section VIII (A) so ambiguous as to require Commission clarification."[42]

15. Narragansett next argues that this dispute is merely a matter of significance between the parties and does not require the Commission to assert primary jurisdiction to ensure a unified outcome with a large number of similar cases.[43] In Narragansett's view, the issues Narragansett presented to the District Court in its complaint are "narrowly tailored to the specific facts of the case" and "turn on the particular contracts between Constellation and [Narragansett] and the provision of the Settlement Agreement directed specifically to the parties and the State of Rhode Island."[44] Narragansett asserts that

---

[37] *Id*.

[38] *Id*. at 16.

[39] *Id*. at 17.

[40] *Id*. at 18-19.

[41] *Id*. at 17.

[42] *Id*. at 19.

[43] *Id*. at 20.

[44] *Id*.

Commission intervention is "especially inappropriate" because Constellation has admitted that its petition only involves the relationship between the FCM Settlement Agreement and the power purchase agreements.[45]

16. Finally, Narragansett argues that this case does not implicate any of the Commission's important regulatory responsibilities.[46] Narragansett asserts that the policy issues Constellation raised to support its petition have no bearing on this case. Narragansett maintains that "this dispute does not implicate concerns of settlement agreements modifying bilateral contracts" because Section VIII (A) explicitly confirmed Constellation's obligation to supply Narragansett with capacity under the power purchase agreements.[47] According to Narragansett, the power purchase agreements require Constellation to supply capacity to Narragansett "with any modification in the price of capacity being a bargained-for-risk that Constellation assumed under the [power purchase agreements]."[48] Narragansett further claims that this case does not threaten the sanctity of Commission settlement agreements.[49] In Narragansett's view, this case "is nothing more than a contract dispute between two parties," and granting Constellation's petition "would be to condone Constellation's blatant attempt at forum-shopping."[50]

Rhode Island's Protest

17. Rhode Island likewise argues that the Commission does not have exclusive jurisdiction over this case because it involves "nothing more than [a] simple matter of contract interpretation, the outcome of which hinges upon the meaning of Section VIII (A)."[51] Rhode Island asserts that "[a]s long as the principal nature of the action is one of contract interpretation," Commission and court precedent dictate that "the filed rate

---

[45] *Id*.

[46] *Id*. at 21.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] Motion to Intervene and Protest of the State of Rhode Island and Providence Plantations and the Rhode Island Division of Public Utilities and Carriers at 10 (Rhode Island's Protest).

doctrine does not divest the federal courts of jurisdiction."[52] Rhode Island further argues that the Commission does not possess primary jurisdiction under *Arkla*. Rhode Island cites Commission precedent stating that straightforward matters of contract interpretation do not require the Commission's special expertise and are better handled by a court.[53] Rhode Island next claims that this case does not implicate considerations of uniformity because "the unique circumstances giving rise to the inclusion of Section VIII (A) in the Settlement make it highly unlikely that a similar scenario will ever reoccur."[54] Rhode Island explains that:

> At a critical point in the negotiations [of the FCM Settlement Agreement], only two New England states supported the [FCM] Settlement. Without [Rhode Island's] agreement to become a Settling Party, ISO-New England would not recommend the FCM reflected in the Settlement to the Commission. The State, thus, became a "swing" settlement participant. Settlement participants, including Rhode Island standard offer wholesale suppliers, included Section VIII (A) in the Settlement to induce the State to become a Settling Party, thereby giving ISO-New England the three New England states that it needed to recommend the Settlement to the Commission.[55]

Rhode Island further maintains that it would not have supported the FCM Settlement Agreement had it known that Constellation opposed Section VIII (A), and that it agreed to the FCM Settlement Agreement in reliance on Constellation's failure to inform both the Settlement Judge and the Commission about its objections.[56] Finally, Rhode Island claims that the issue of whether Section VIII (A) abrogates Constellation's rights under the power purchase agreements does not raise broad policy or regulatory issues because Section VIII (A) "represents a single, contractual inducement to one settling party… and does not implicate the FCM."[57]

---

[52] *Id*.

[53] *Id*. at 13-14.

[54] *Id*. at 15.

[55] *Id*.

[56] *Id*. at 5.

[57] *Id*. at 16.

18. Rhode Island makes two additional arguments urging the Commission to dismiss Constellation's petition on procedural grounds. First, Rhode Island argues that the Commission should not exercise its discretion to issue a declaratory order because Rhode Island has additional claims that will not be resolved even if the Commission grants Constellation's petition for a declaratory order.[58] Second, Rhode Island offers several theories asserting that Constellation has either waived its right to challenge the FCM Settlement Agreement, is precluded or estopped from challenging the FCM Settlement Agreement, or implicitly supported the FCM Settlement Agreement by failing to articulate opposition at appropriate times in the settlement process.[59]

19. Addressing the merits of Constellation's petition, Rhode Island maintains that Section VIII (A)'s "plain and unambiguous" language precludes Constellation from renegotiating the prices in the power purchase agreements.[60] Rhode Island also claims that this interpretation is consistent with the intentions of the parties responsible for drafting and including Section VIII (A) in the FCM Settlement Agreement.[61] Narragansett and Rhode Island assert that Section VIII (A) was added, at Rhode Island's specific request, with the express intention of preventing Constellation and other wholesale capacity providers from passing on increased costs resulting from the FCM Settlement Agreement.

Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[62] the timely, unopposed motions to intervene serve to make TransCanada, Narragansett, and Rhode Island parties to this proceeding.

---

[58] *Id*. at 8-9.

[59] *Id*. at 22-30.

[60] *Id*. at 18-19.

[61] *Id*. at 19-20.

[62] 18 C.F.R. § 385.214 (2006).

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,[63] prohibits an answer to a protest unless otherwise ordered by a decisional authority. We are not persuaded to accept Constellation's answer to Narragansett's and Rhode Island's protests, and will, therefore, reject it. Rule 213(a)(2) also prohibits an answer to an answer unless otherwise ordered by a decisional authority. We are not persuaded to accept either Narragansett's or Rhode Island's answer to Constellation's answer, and will, therefore, reject them.

B. Constellation's Petition

22. We will deny Constellation's request for a declaratory order. As a preliminary matter, we find that this case does not fall within the Commission's exclusive jurisdiction. Constellation's dispute with Narragansett is a dispute over the meaning of Section VIII (A) of the FCM Settlement Agreement. It is well established that courts and the Commission have concurrent jurisdiction over cases interpreting contracts and settlement agreements.[64]

23. We will also decline to assert primary jurisdiction based on our evaluation of the case according to the factors set forth in *Arkla*. The issues here are the proper interpretation of Section VIII (A) and its relationship to the power purchase agreements. We find that we do not possess special expertise beyond that of the District Court in this matter. Construing contractual and settlement agreement provisions and inquiring into the parties' intent are straightforward matters of contract interpretation that in these circumstances are better left to the District Court.[65] Contrary to Constellation's assertion, there is no need for uniformity here. This is merely a dispute between Constellation and Narragansett over the effect that the FCM Settlement Agreement has on their power purchase agreements. Finally, while this is a matter of significance to the parties, the resolution of this contract interpretation dispute is not important in relation to the Commission's regulatory responsibilities.

24. We are satisfied that analysis of each *Arkla* factor leads to the conclusion that this dispute does not require the Commission to assert primary jurisdiction. Therefore, we deny Constellation's petition for a declaratory order.

---

[63] 18 C.F.R. § 385.213(a)(2) (2006).

[64] *See Portland General Elec. Co.*, 72 FERC ¶ 61,009 at 61,021 (1995); *Kentucky Utilities Co.*, 109 FERC ¶ 61,033 (2004), *reh'g denied*, 110 FERC ¶ 61,285 at P 10-11 (2005) (*Kentucky Utilities*).

[65] *Kentucky Utilities*, 109 FERC ¶ 61,033, at P 15.

The Commission orders:

Constellation's petition for a declaratory order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.